In the Supreme Court of the United States.

OCTOBER TERM, 1918.

FREDERICK J. McLEOD AND EVERETT E. Stone, constituting the Public Service Commission of Massachusetts, Petitioners,
v.
NEW ENGLAND TELEPHONE & TELEgraph Company.
} No. 957.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

DAKOTA CENTRAL TELEPHONE COMPANY et al., Plaintiffs in Error,
v.
THE STATE OF SOUTH DAKOTA, EX REL. et al.
} No. 967.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR THE RESPONDENT IN NO. 957 AND THE PLAINTIFFS IN ERROR IN NO. 967.

STATEMENT OF THE CASE.

INTRODUCTION.

These are suits brought, in the one instance by the Public Service Commission of Massachusetts, and in the other by the State of South Dakota on the

relation of its Attorney General and Board of Railroad Commissioners (hereafter collectively referred to as plaintiffs), against certain telephone companies (hereafter called defendants) seeking an injunction to enjoin said defendants from putting into effect an order (No. 2495) of the Postmaster General, Albert S. Burleson, effective January 21, 1919, establishing a classification of service and schedule of charges for toll and long-distance telephone service furnished by telephone systems operated by the Postmaster General in pursuance of a Joint Resolution of Congress and a Proclamation of the President, in so far as said order relates to or affects telephone messages between points wholly within said States, respectively. (R. No. 957, 1–12; No. 967, 3–13.)

THE MASSACHUSETTS CASE.

In No. 957 the Public Service Commission of the Commonwealth of Massachusetts on February 1, 1919, filed in the Supreme Judicial Court of that Commonwealth, in Suffolk County, a bill of complaint against the New England Telephone & Telegraph Company, alleging that said company is a public service corporation engaged in said Commonwealth in the business of transmitting intelligence by means of telephone lines (R. 1).

The bill alleged that on or about July 31, 1918, the President of the United States, acting under a Joint Resolution of Congress approved July 16, 1918, took possession and assumed control of all telephone systems and properties in the United States, includ-

ing those of defendant telephone company, and placed such properties in the general charge of the Postmaster General of the United States, who in turn entrusted to defendant telephone company the direction and operation of its properties (R. 1).

The bill further alleged that on December 21, 1918, defendant company by direction of the Postmaster General transmitted to the Secretary of said Public Service Commission "basic toll rate schedule No. 1 cancelling and superseding the basic toll rate schedules filed with [said] Commission on October 18, 1916, this basic schedule [being] in accordance with Telephone & Telegraph Bulletin No. 22, Order No. 2495, of the Postmaster General * * * effective January 21, 1919" (R. 1–2, 23).

Further, that plaintiffs on January 9, 1919, pursuant to section 21 of chapter 784 of the Laws of 1913 (Mass.), gave notice of a public hearing on said proposed schedule to be held on January 17; that hearings were held on said date and on January 30 at which a representative of defendant was heard; that on January 20, 1917, plaintiffs issued an order pursuant to said act suspending said proposed schedule of rates until February 20, 1919; and that on January 31, 1919, plaintiffs made a report on said schedule and entered an order requiring defendant to cancel the same and to put into effect said former rates (R. 2).

That notwithstanding plaintiffs' order of January 20, 1919, defendant company, on January 21, 1919, put into effect said new schedule and is now charging

the rates prescribed therein; that said defendant denies plaintiffs' jurisdiction to enter said orders or to fix or determine intrastate rates; and that by said chapter 784 of the Laws of 1913 of said Commonwealth, and said Joint Resolution of Congress, it is defendant's duty to obey plaintiffs' orders. Injunction temporary and permanent accordingly is prayed (R. 2–3).

The Massachusetts statute under which the Public Service Commission claims authority prescribes that said commission shall, so far as necessary to carry out the provisions of said act or any other act, have general supervision and regulation of, and jurisdiction and control over, all persons, firms, corporations, associations, and joint-stock associations or companies rendering or furnishing in said Commonwealth certain classes of service, including telephone service. Such companies, therein called common carriers, are required to file all rates and charges with the Commission, and changes in rates can only be made after hearing before the Commission, which can refuse to allow a change, or itself fix a reasonable rate or charge. (Laws and Resolves of Massachusetts, 1913, ch. 784.)

THE SOUTH DAKOTA CASE.

In No. 967 the State of South Dakota, on the relation of its Attorney General and Board of Railroad Commissioners, on January 20, 1919, filed a complaint in equity in the Supreme Court of that State, exercising original jurisdiction, against the Dakota

Central Telephone Company and three other telephone companies owning lines and plants in said State and alleged to be doing business therein, alleging in substance as follows:

That under the statutes of said State (Sess. Laws 1909, c. 289, sec. 2, as amended by Sess. Laws 1911, c. 218) said Board has general supervision and control over all telephone lines and exchanges in said State, with power to inquire into unjust discriminations and violations of law, and with power to fix individual rates and make schedules of maximum rates to be charged by telephone companies; that by the provisions of said laws telephone companies before commencing to charge any rate must file a full and correct tariff thereof with said Board; that certain notices must be given and hearing had and the assent of said Board obtained before any increase is made in any such rate; and that it is unlawful for any such company to charge, demand, collect or receive any higher rates for intrastate service than those established with the approval of said Board (R. 4–6).

That said Board is now engaged in and has not completed a state-wide investigation as to the reasonableness, justness, and propriety of existing rates for telephone service in said State and as to rules, regulations and classifications relating to such service, and will, when it has concluded same, fix and establish reasonable rates, etc., for all service between points in said State (R. 6).

That notwithstanding the foregoing provisions of law and in disregard of the authority of said Board, defendant telephone companies propose to, and unless restrained will, put into effect new schedules of rates, charges, and classifications for intrastate service on January 21, 1919, without having procured the approval thereof by said Board (R. 6–7).

That this will be done because, on July 23, 1918, the President, in compliance with a Joint Resolution of Congress, approved July 16, 1918, authorizing him so to do, took possession of all telegraph and telephone lines, including those of defendant companies, and placed them in charge of the Postmaster General; that said Postmaster General by his order No. 2495 established said schedule of rates effective January 21, 1919, for service within the State of South Dakota; and that defendant companies contend that they are required and compelled to establish and make effective such rates (R. 7–9).

That the Postmaster General has no power or authority under the Resolution of Congress or the Proclamation of the President to initiate intrastate telephone rates; that said Resolution provides that nothing therein contained shall be construed to amend, repeal, impair, or affect existing laws or powers of taxation, or, "the lawful police regulations of the several States;" and that thereby the power was reserved to the State of South Dakota to regulate intrastate rates for telephone service of all classes and to prevent their change except after submission

to and approval by said Board of Railroad Commissioners, as provided by the laws of said State (R. 8–9).

That the State through its departments of government is a heavy user of intrastate long distance telephone service, and the putting into effect of the new schedule of rates, etc., will greatly increase the charges therefor to the State and the public (R. 9).

SUBSTANCE OF THE ANSWERS.

The defendant telephone companies in each of said cases filed substantially the same answer:

The answers severally allege the passage by Congress of the Joint Resolution approved July 16, 1918, 40 Stat. 904, authorizing the President "to supervise or take possession and assume control of any telegraph or telephone * * * system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision [etc.] shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace" (R. 957, 13–14; R. 967, 18–19).

Said answers further allege the Proclamation of the President dated July 22, 1918, taking possession and assuming control of the telephone and telegraph systems. Said proclamation provided that the operation and control of such systems should be exercised by and through the Postmaster General; that the latter should perform the duties thereby imposed on him, so long and to such extent as he might determine, through the owners, officers, and employees of such

systems; that the Postmaster General may by subsequent order release the control and operation, in whole or in part, of any system "hereby assumed"; and that from and after midnight of July 31, 1918, all such systems "shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice" (R. 957, 13–14, 20–21; R. 967, 19–20).

Said answers further allege that such possession and control and operation was assumed from midnight of July 31, 1918, and still continues; that defendant companies have been divested of their systems (except the title thereto) and of full power, management, and control thereof; that said defendants and their officers and employees since said date have not been in possession of said systems except as agents, representatives, or instrumentalities of the United States, acting under the direction and control of the President and the Postmaster General; that the compensation to be paid by the United States to all defendants save one has been fixed and agreed on, as authorized by said Joint Resolution of Congress; and that the rates, tolls, and earnings of said systems belong to the United States and not to said defendant companies, who have no pecuniary interest therein under the arrangement and contract for compensation made, and will have none until the possession of the United States under said Joint Resolution is terminated (R. 957, 15–16; R. 967, 21–22).

The right of the public service commissions to interfere with the rates prescribed by the Postmaster

General, or that such rates need their approval before they are lawfully effective, or that the proviso of said Joint Resolution, preserving in effect the lawful police regulations of the States, relates to or confers any such right as is claimed by said commissions, is denied (R. 957, 17–18; R. 967, 24–25).

The answers also set up that to these suits the President and the Postmaster General are indispensable parties and can not lawfully be made such; that the suits are in effect suits against the United States and directly affect it and its interests, and that they can not be maintained because the United States has not consented to be sued (R. 957, 19–20; R. 967, 24–25).

DECISIONS OF THE COURTS BELOW.

No. 957—the Massachusetts Case—This case was reserved by the Justice to whom the application for injunction was made for the determination of the full court upon bill and answer. The Supreme Judicial Court, in an unanimous opinion, rendered by Chief Justice Rugg, held (*a*) that the effect of the Joint Resolution of Congress and the Proclamation of the President was to vest the possession and control of the telephone properties in the Postmaster General on behalf of the United States to the "exclusion of every private interest;" (*b*) that the United States is a necessary party to the suit, (*c*) and that the United States not having consented to be sued the complaint must be dismissed (R. 26–30).

No. 967—the South Dakota Case—This case was submitted to the Supreme Court of the State upon the pleadings, and the court on March 24, 1919, by a majority decision (three judges concurring and two dissenting), adjudged and decreed that an injunction issue against the defendants as prayed; that the suit is not against the United States but is one against the several corporations to restrain the commission of an act not authorized under the laws of the United States and which would be in violation of the laws of the State; and decided against the authority in the Postmaster General under the resolution of Congress and in favor of the validity of the statutes of the State of South Dakota. (Majority opinion, R. 37–40; dissenting opinion, R. 40–45.)

POINTS INSISTED ON IN THE MASSACHUSETTS CASE, NO. 957.

The Supreme Judicial Court of Massachusetts ruled correctly in holding the suit to be in effect one against the Government.

ASSIGNMENTS OF ERROR IN THE SOUTH DAKOTA CASE, NO. 967.

1. The Supreme Court of South Dakota erred in holding that the suit is not one against the United States without its consent.

2. Said court erred in holding that the term "lawful police regulations" in the second proviso of the Joint Resolution approved July 16, 1918, is used therein in the broad sense which includes the power of rate making.

3. Said court erred in holding that, under said resolution, the power to fix intrastate rates and charges of telephone systems of which the President had assumed possession, operation, and control was not vested in the President, or his representative, the Postmaster General.

4. Said court erred in holding that the police regulations of South Dakota extend to or affect schedules of toll rates for telephone service promulgated by the Postmaster General, and in not holding that such regulations are not authorized by said proviso to said resolution of July 16, 1918.

5. Said court, having held that the statutes of said State applied to rates made by the Postmaster General, erred in not holding that said statutes so construed were in conflict with said Joint Resolution and were superseded thereby as to rates made by the Postmaster General.

6. Said court erred in failing and refusing to decide and find that the South Dakota State Railway Commission has been granted by the Legislature no control over telephone systems operated by the Federal Government.

7. Said court erred in failing and refusing to adjudge and decree that the defendants, their officers, agents, and servants are, during the period of Federal control, the officers, agents, and servants of the United States and subject only to the orders, direction, and control of the Postmaster General and of the President.

8. Said court erred in granting the injunction (R. 967, 54–56).

These assignments of error present all points involved in both cases.

ARGUMENT.

I.

These suits are in effect against the United States and therefore not within the jurisdiction of the courts. They seek an injunction which, if granted, will restrain the United States in the use of property, its right to possession and operation of which is not attacked, and would compel the United States to furnish service, at risk of loss, on rates it has superseded.

Whether a suit is one in effect against the United States and not maintainable because the United States is not and can not be made a party thereto, will be determined by its substantial character and not by its formal title or parties.

This is so notwithstanding the fact that the defendant named is a Cabinet officer, or his appointee, and not the United States *eo nomine*.

These suits are against the defendants who are operating as appointees and agents of the Government, under the authority of the Proclamation of the President of the United States, and under the direct orders and appointment of the Postmaster General. The defendants named have no personal interest in the result of the suits. Their compensation as owners of the property taken from their possession and being operated by the Government is fixed, and is not dependent upon the results of such operation. If the granting of the injunction sought in these cases should require the Government to operate these properties at a loss, such loss

must be borne by the Government. In its effect upon the financial result it is the United States which is affected and not the defendant companies. Even if it could be claimed that the defendants had an interest, it would none the less be evident that the great and ultimate interest in these operations and in the rates affected by these suits is in the United States. It is inconceivable that the decision, directly affecting and controlling the revenues which will come into the possession of the officers of the United States for its benefit and use in conducting the operations of these properties, should be made by the court without the United States being a party to the suit. It has not consented to be sued, and no officer or agent of the United States has been authorized to make it a party and submit its interest to the judgment of the courts. *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

The cases holding that injunctions so affecting the interests of the United States can not be granted against individuals in possession of, and operating, property to which the United States has the right of possession are numerous.

Where an injunction was sought against the commandant of a navy yard to prevent the use of gates manufactured and used by the United States through him, which it was claimed infringed a patent, this court said:

> No injunction can be issued against officers of a State to restrain or control the use of property already in the possession of the

> State * * * or where the state has otherwise such an interest in the object of the suit as to be a necessary party. (*Belknap* v. *Schild*, 161 U. S. 10.)

A patentee can not secure an injunction against a postmaster to prevent his using an infringing device in his possession for canceling stamps. *International Postal Supply Company* v. *Bruce*, 194 U. S. 601. The Court said:

> In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property, a right *in rem*, in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right can not be interfered with behind its back and, as it can not be made a party, this suit, like that of *Belknap* v. *Schild*, must fail.

The two cases just cited were cases in which the right of the complainant was assumed to be unquestionable and in which the defendant relied on no Act of Congress.

A State which operates a sugar plantation can not maintain a petition for mandamus against the Secretary of the Treasury to prevent him from demanding and collecting illegal rates of duty, because such a suit is in its essence a suit against the United States. *Louisiana* v. *McAdoo*, 234 U. S. 627.

In *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222, it was held that a person who claims a vessel in the pos-

session of the Secretary of the Navy on the ground that he has made a valid contract for it can not obtain a writ of mandamus against the Secretary, because:

> The United States is the owner in possession of the vessel. It cannot be interfered with behind its back and as it cannot be made a party, this suit must fail; *Belknap* vs. *Schild*, 161 U. S. 10; *International Postal Supply Co.* vs. *Bruce*, 194 U. S. 601, 606; *Oregon* vs. *Hitchcock*, 202 U. S. 60, 69; *Naganab* vs. *Hitchcock*, 202 U. S. 473, 476.

In *Hopkins* v. *Clemson College*, 221 U. S. 636, the court held that the plaintiff could recover from the defendant claiming to be an agent of the state for damages resulting from the tortious act of the defendant in erecting an unlawful dyke on land of the State, by which the plaintiff's land was overflowed; but that an injunction could not issue to remove the dyke. The Court said (pp. 642, 648):

> No suit, therefore, can be maintained against a public officer which seeks to compel him * * * to do any affirmative act which affects the State's political or property rights.
>
> The plaintiff prayed not only for damages but that the embankment should be removed. The title to the land and everything annexed to the soil is in the State * * *. The State, therefore, may be a necessary party to any proceeding which seeks to affect the land itself, or to remove any structure thereon which has become a part of the land. If so, and unless it consents to be sued, the court

> can not decree the removal of the embankment which forms a part of the State's property.

The distinction between a liability for damages and a right to proceed by suit in equity is in accord with the distinction drawn by the court in *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 456, where the Court, in speaking of an action at law, says:

> It is no answer for the defendant to say I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority.
>
> Courts of equity proceed upon different principles in regard to parties. As was said in *Barney* vs. *Baltimore*, 6 Wall. 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in *Shields* vs. *Barrow*, 17 How. 130, "They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience."
>
> "In such cases," says the court in *Barney* vs. *Baltimore*, 6 Wall. 280, "the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In *Wells* v. *Roper*, 246 U. S. 335, the court dismissed a bill in equity for an injunction to restrain the First Assistant Postmaster General from annulling a contract made between the plaintiff and the Postmaster General acting for the United States, and from interfering between the plaintiff and the United States in the performance of the contract. The Court said (p. 337):

> The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties.
>
> That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain.
>
> Neither the question of official authority nor that of official discretion is affected, for present purposes by assuming or conceding, for the purposes of the argument, that the

proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.

While the defendants in the case at bar are in possession, they hold only in their character as agents of the United States and for the purpose of operating the property for the United States. They are in possession under a resolution of Congress and by a specific order of the President issued thereunder. The right to so possess and operate is not attacked.

The cases are wholly different from suits such as *United States* v. *Lee*, 106 U. S. 196. In that class of cases the right to possession of the individual defendants is attacked by persons claiming title and right of possession, and asserting that the defendants are wrongfully in possession as trespassers. To the defense that defendants are in possession representing the Government, it can be replied that the defense claimed does not exist either because the act under which authority is claimed is unconstitutional, or because the same did not authorize the taking possession of the particular property.

But even in such cases if the suit is one which in effect grants affirmative relief, or compels action by the Government at its expense, the suit is considered one against the Government and can not be maintained. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 16–17.

These cases are unlike those where an officer in excess of authority is invading the property of an-

other or is withholding property from another to which the other person has a right, and are therefore different from such cases as *School of Magnetic Healing* v. *McAnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

In the first of these cases the complainant was seeking possession of its conceded property withheld by the Postmaster General under a mistake of law. The United States made no claim to it. In the second the injunction was to restrain the taking of complainant's property, admittedly his, by an officer in excess of the power delegated.

Here the effort is to require the United States to carry on business with property which it lawfully possesses and prevent it from fixing the price it deems reasonable for service it must furnish.

The interest of the United States in the subject matter of these suits and its relation as a necessary party is most clearly stated in the opinion of the Supreme Judicial Court of Massachusetts in the case now under review on writ of certiorari. We quote from the opinion as follows (R., p. 29):

> The reasonableness and amount of the rates to be charged for intrastate toll telephone service are of direct concern to the United States. As was said in *Wells* v. *Roper*, 246 U. S. 335, at 337, "that the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely

plain." In *Louisiana* v. *McAdoo*, 234 U. S. 627, at 629 are found these words: "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387." These statements but summarize the effect of earlier and exhaustive discussions of the principles applicable to states of facts so similar to those presented in the case at bar as to be indistinguishable. *Belknap* v. *Schild*, 161 U. S. 10, and cases there reviewed by Mr. Justice Gray. *Louisiana* v. *Garfield*, 211 U. S. 70, 77. *Oregon* v. *Hitchcock*, 202 U. S. 60. *Naganab* v. *Hitchcock*, 202 U. S. 473. The circumstance that the United States is not the owner of the system of the defendant but only rightfully in possession of it with the right to collect reasonable tolls is immaterial in this connection. "It has a property, a right in rem * * * which, though less extensive than absolute ownership, has the same incident of a right to use." *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606.

It is evident the direct result of the present suit is to not only deprive the United States of the revenues to be derived from its operation of these properties, but to require it to pay any deficit from the Treasury of the United States.

The President, having taken possession and control, is required to operate these properties. A decree enjoining the new rates and commanding the observance of the former lower rates, of necessity compels the operation at such lower rates.

It is submitted that the decision of the Supreme Judicial Court of Massachusetts holding that the suit was in effect one against the United States and therefore not maintainable was correct and should be affirmed, and that the contrary decision by the Supreme Court of South Dakota was erroneous.

While not involved in the legal question, it is interesting to note that there is no allegation in these cases that the rates proposed are unreasonable. It affirmatively appears in the South Dakota case that the rates, which that decision would maintain, are the subject of question and investigation by the Commission itself.

II.

The purpose and effect of said Joint Resolution and Proclamation was completely and exclusively to vest the possession and control of defendants' telephone systems in the President through the Postmaster General as his appointee on behalf of the United States.

The bills of complaint wholly fail to recognize that the defendant telephone companies in the several States have ceased to operate the telephone lines as common carriers and in fact are acting only as instrumentalities or agencies of the United States in the operation of said properties by the President through the Postmaster General. It will assist to

an understanding of the true nature of these proceedings to review briefly the several steps involved in the taking over of the telephone systems.

On April 6, 1917, Congress declared a state of war between the United States and the Imperial German Government, the declaration providing, among other things, that "to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." (40 Stat. 1.)

In furtherance of said declaration Congress on July 16, 1918, adopted the aforesaid Joint Resolution authorizing the President, whenever he deemed it necessary for the national security or defense, to take possession and assume control of any and all telegraph and telephone systems "and to operate the same in such a manner as may be needful or desirable for the duration of the war." (40 Stat. 904.)

Acting under and by virtue of said Joint Resolution, and of all other powers thereto him enabling, the President by a proclamation dated July 22, 1918, took possession and assumed control, as of midnight on July 31, 1918, "of each and every telegraph and telephone system and every part thereof, within the jurisdiction of the United States."

The President, among other things, directed that the control and operation of said systems should be exercised by and through the Postmaster General, and that the latter might perform such duties, so long and to such extent as he might determine, through the

owners, officers, and employees of the several companies.

As a result, from and after midnight on July 31, 1918, defendants in their corporate right ceased to be engaged in the operation of their respective telephone systems, and from said day up to and including the filing of the bills of complaint herein, have not been and are not now operating (in their corporate right) any telephone exchanges or facilities in the several States, but are acting alone as agencies of the Government in the operations conducted by the President.

Defendants' officers and employees since said date have been in charge of their respective telephone systems, and have been transacting the usual business of such systems solely as agents or representatives of the Postmaster General on behalf of the United States.

The Postmaster General may at any time, without notice to said defendant telephone companies, wholly remove said companies from all connection with the operation of said telephone systems, and substitute other persons in place of said companies, or may at any time direct that said telephone systems cease to be operated in the name of defendant companies.

The purpose and effect of said resolution and proclamation, therefore, was completely and exclusively to vest the possession and control of the several telephone systems in the Postmaster General, as the immediate representative of the President, on

behalf of the United States. As said by Chief Justice Rugg, of the Supreme Judicial Court of Massachusetts, in *McLeod* v. *New England Tel. & Tel. Co.* (R., No. 957, pp. 28–29):

> It seems manifest from this narration of facts and recital of official documents that the United States is vitally interested and is alone concerned in the toll rates to be collected for telephone service over the system belonging to the defendant. The resolution of Congress of July 16, 1918, is most comprehensive in scope. It authorized the President to take full, complete, absolute and unqualified possession of the defendant's system. It seems to us that the proclamation of the President according to its true construction was coextensive in its sweep with the power conferred by the resolution. By express words the President took possession and assumed control of every part of each and every telephone system including all equipment and appurtenances and all materials and supplies. It would be difficult to employ words of broader reach or wider embrace than those in which the proclamation is couched. The phrase of the bulletin of the postmaster general is equally comprehensive in its grasp. The effect of these documents was not a mere public supervision of an operation by private owners. It was a complete assumption of absolute and complete possession and control to the exclusion of every private interest. No distinction is made by their terms between interstate service and intrastate service. Both

alike are taken into the possession of the United States. Powers so extensive as were thus assumed can be exercised only through various governmental agencies. But the right and power of the government are paramount and admit of no associates. In execution of the authority conferred by the resolution of July 16, 1918, just compensation for that which has been taken from the defendant has been awarded by the President and accepted by the defendant. Its interest has come to an end as to the matter of charges to be exacted for the service rendered by the United States for the use of the property of the defendant. The government has utterly supplanted the defendant in this field. The matter of rates is now the sole financial affair of the United States.

III.

The taking possession and assuming control and operation by the President under the joint resolution of July 16, 1918, constituted said systems public utilities operated by the Government, and made it the right and duty of the President and his representative to fix the charge to be paid for service.

The general plan of Congress in utilizing the transportation systems of the country as a part of its resources in the prosecution of the war, and the essential part in its conduct filled by the taking possession thereof by the President, is fully set forth in the briefs filed in the case of *The State of North Dakota* v. *Hines, Director General, et al.*, No. 976, which are prayed to be considered in connection herewith.

The taking over of the telegraph and telephone lines succeeded this taking of the railroads while the stress of the war was at its greatest, and the control of these instrumentalities of commerce and transmission of communication was most important both to promote the Government activities and aid in the national security.

The taking of the lines was complete and brought all of their uses under the operation of the Government. Their use by private persons was thus made subordinate to Government use. The operation of the lines thus became a part of the war activities of the Government, and the utilization of the public utilities in its prosecution.

In discussing the war power under the Constitution Madison says in the Federalist:

> With what color of propriety could the force necessary for defense be limited by those who can not limit the force of offense? If a Federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then, indeed, might it prudently chain the discretion of its own Government, and set bounds to the exertions for its own safety * * *. The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.

services and facilities of carriers within its borders are as broad and all-inclusive as the control of Congress over interstate transportation and facilities and services connected therewith; (citing cases) for the exclusive rights and powers of the states over their own territories were established with the beginning of our government. he people of the United Colonies in separating from Great Britain, changed the form, but not the substance of their government. As independent states, they retained, for the purposes of government, all the authority and prerogatives of the Parliament of England. They continued to and do now possess and enjoy all of those same powers, except those which have been surrendered and delegated to the United States through the adoption of the national Constitution.

Roberts Federal Liabilities of Carriers, Vol. 1, pages 68, 69, 70, 71.

During times of peace the Federal government possesses no power to regulate rates of telephone companies except that which is conferred on it by the commerce clause of the constitution.

Nothing is better settled in the law than that the commerce clause of the Federal Constitution is confined to interstate commerce, and that the power to to regulate domestic or intra-state commerce resides in the states. As was said in **2 Elliott on Railroads, paragraph 690:**

> "If the places from which the passengers or property are transported are within the State, and the places to which they are carried are also within the State, the transportation being wholly therein, the commerce is domestic and not inter-state commerce, and, as domestic comerce, is subject to State control."

In **The Louisville, New Orleans and Texas Railway Company vs. State of Mississippi, 133 U. S. 587, 33 L. Ed. 784,** a statute of Missippi requiring railroads carrying passengers in that State to provide equal but separate accommodations for white and colored races, by providing two or more passenger cars to each passenger train or by dividing the passenger cars by a partition so as to secure separate accommodations, was alleged to be in contravention to the commerce clause of the Federal Constitution. Under the construction of the highest Court of Mississippi it was held that the act applied only to intra-state commerce. On appeal to the Supreme Court of the United States, it was held that the act applying only to such commerce it was not in contravention to the commerce clause of the Federal Constitution. (Opinion page 591, L. Ed. 785).

> "No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the

power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commer clause.

"It has often been held in this Court, and there can be no doubt about it, that there is a commerce wholly within the State, which is not subject to the constitutional provision, and the distinction between commerce among the states and other class of commerce between citizens of a single state and conducted within its limits exclusively, is one which has been fully recognized in this Court, although it may not be always asey, where the lines of these classes approach each other, to distinguish between the one and the other. (Citing cases).

"The statute in this case, as settled by the Supreme Court of the State of Missippi, affects only such commerce within the State, and comes therefore within the principles thus laid down."

The same principles apply to telephone companies where messages are transmitted to points wholly within the State, and where in such transmission State lines are not crossed.

See also—

Western Union Telegraph Company vs. Texas, 105 U. S. 460, 26 L. Ed. 1067.

Hall vs. De Cuir, 95 U. S. 485.

The national legislative body has therefore no power to regulate or control carriers engaged exclusively in intra-state commerce. he Federal government cannot take over, regulate or control carriers engaged solely in intra-state commerce during times of peace, without an amendment to the National Constitution, but in times of war no such limitations upon the powers of Congress exist. The Constitution provides that Congress may declare war and enact all laws which shall be necessary and proper to carry on the war.

The power to declare war carries with it as an incident thereto, and inseparable therefrom, the right to prosecute the war by all the means known to, and recognized by all ,civilized nations. It is admitted that Congress might, under its powers to declare war and prosecute war by all the means known to, and recognized by, civilized nations, take over exclusively and for government purposes and for prosecuting a war to a successful end, the entire system of a telephone company. But certainly under no powers granted to Congress by the Constitution for the purpose of prosecuting a war, could Congress assume to take over a telephone system and regulate the rates for messages of private citizens between points within a state. By no straining of the definition of terms can the fixing of rates to telephone users be said to be a "war measure."

> "The constitution was not, therefore necessarily carved out of existing state sovereignties, not a surrender of powers already existing in state institutions, for the

powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares, that 'powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' "

Per Story, J., in Martin vs. Hunter's Lessee, 1 Wheaton 304; 4 L. Ed. 97.

THE ATTEMPT TO REGULATE RATES CAN NOT BE SUSTAINED AS A REVENUE MEASURE.

On this subject the Indiana court in the case of State of Indiana v. Indianapolis Phone Co. (not yet reported) well said:

"We suppose it is clear that when a person having the right under the existing state law to use a telephone for one dollar is required to pay two dollars for that service,

> or when the people of a state, being entitled to a certain telephone service for five million dollars are required to pay ten million dollars for that service, they are deprived of a property right, unless their property right in the service at the cheaper rate has ceased to exist. And under the fifth amendment to the Constitution of the United States, Congress has no power to take property or property rights for public use 'without just compensation.' "
>
> U. S. Const., Amend. 5.

And it could hardly be claimed that this court has judicial knowledge that the users of telephones are compensated by reason that the service given is now twice as good as it was before. The persons, within the State of Pennsylvania, selected without reference to the comparative numbers of such persons in Pennsylvania and in other states, and without reference to any facts concerning them except the tolls they pay for the use which they make of the telephones for messages wholly within the State, and without reference to their respective incomes, could not be required to contribute in that manner to the revenues of the United States from which to pay the expenses of its taking over and operating the telephones, under the taxing power, for the Constitution (Article 1, Sec. 8) requires that "all duties, imposts and excises shall be uniform throughout the United States"; and that "no capitation or other direct tax shall be laid, unless in proportion to the census" (Const. Art. 9), with the single exception that an income tax may

be imposed (Amendment 16). And to impose an extra dollar on the man who used the phone once for a call to Birmingham, and five hundred dollars on the man who did large telephone business, and nothing at all on the person who did not use the telephone for distance calls would not make the taxation either "uniform" or "in proportion to the census." Moreover, all bills for raising revenue shall originate in the House of Representatives (Article 1, Sec. 7) under which provision taxes can only be laid by a bill originating in that house, and not by a joint resolution, and anything else but such a bill, so originating, is void.

United States, ex rel. v. James, 13 Blatch. 207, 26 Fed. Cas. No. 15, 464;
Hubbard v. Lowe (1915), 226 Fed. 135.

II.

THE POSTMASTER GENERAL HAS NO POWER TO REGULATE AND FIX RATES OF TELEGRAPH AND TELEPHONE COMPANIES UNDER THE WAR POWERS OF THE PRESIDENT CONFERRED BY THE CONSTITUTION.

The plaintiff in his Bill of Complaint alleges as a source of his authority to regulate and fix rates, the war power of the President of the United States.

We contend that no war power of the President authorizes the regulation of rates to be charged citizens of a State, for telegraph and telephone service.

The Constitution of the United States confers certain war powers upon Congress and certain war powers upon the President. Those conferred upon Congress are the following:—

"That Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States * * * * *;

"To declare war, grant letters of marque and repraisal, and make rules concerning captures on land and water;

"To raise and support armies;

"To provide and maintain a navy;

"To make rules for the Government and regulation of the land and naval forces;

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions;

"To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States * * * * *;

"To make all laws which shall be necessary for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof." (Article 1 ,Section 8.)

"The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." (Article 2; Section 2.)

"He shall take care that the laws be faithfully executed." (Article 2; Section 3.)

We do not contend that the war power of the President may not become extensive. According to the emergency, the President, we believe, has power in time of war to take and utilize such private property as may be necessary for the supply and maintenance of troops in the field, or the seasonable movement of the army and navy to such places as he deems necessary to conduct the campaigns. The coming of war intensifies and broadens his powers in extent and in freedom of action, and ability to deal summarily with new conditions as the military or naval emergency may demand; but we assert that war does not change the President's powers as to their kind or nature, or operate automatically to transfer to him powers essentially legislative in character, even concerning matters with some aspects of which he deals by virtue of the exigencies of the military command. He continues to be, even as to military matters, the official charged supremely with seeing to it that the laws are faithfully executed.

The power "to provide ways and means" for carrying on the war, to promote "the legislation essential to the prosecution of the war with vigor and success" remains in the Congress, which is clothed with full authority to make all laws necessary and proper for carrying into execution the powers vested in Congress and other Departments of the Government. It is the Congress which is vested with the "power to * * * raise and support armies," and this extends to all the facilities of their equipment, maintenance and transportation to camp or battlefield, and their general effectiveness in the field.

It is undoubtedly the function of the Congress to make available to the President the moneys, supplies, facilities of transportation and other instrumentalities requisite for the carrying on of the war; the President's powers as to such facilities and instrumentalities are based upon the requirements of a military or naval emergency and not upon the mere existence of a state of war.

The Federal power to regulate rates or to prescribe rates, whatever its limits may be, is a legislative power exclusively. As was said by Mr. Justice Moody in **Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371, on page 7, L. Ed. 378:**

> "* * * the function of rate making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. Prentis v. Southern R. Co. 211 U. S. 210, 53 L. Ed. 150; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. Ed. 186,"

and the legislative authority, even as to concerns directly and exclusively military, "is not a part of the power conferred upon the President by the declaration of war."

The sweeping character of the war powers of the Congress even in limitation on those of the Execu-

tive, was long ago expressed by Chief Justice Chase (Ex Parte Milligan, 4 Wall, 2). 18 L. Ed. 281.

"Congress has the power, not only to raise and support armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and conduct of campaigns. That power and duty belong to the President as the Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. * * * The power to make the necessary laws is in Congress; the power to execute in the President. Both imply subordinate and auxiliary powers. Each includes all authority essential to its due exercise."

The existence of war does not suspend the operations of legal remedies applicable to persons resident within the same belligerent areas. 40 Cyc. 329.

Edmondson v. Union Bank, 33 Ga. 91;
Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657.

"It is an unbending rule of law, that the exercise of the military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency required."

Raymond v. Thomas, 91 U. S. 712, 716, 23 L. Ed. 434, 436, citing Mitchell v. Harmony. 13 How. 115.

"The right of the President temporarily to govern localities, through his military offices, is derived solely from the fact that he is commander-in-chief of the army and is to see that the laws are executed; and he can exercise it to just the extent that, and no further than, by the laws of war, a commanding general in the Army of the United States could do it. Where the laws are, or may be executed without the interference of the President, by his military, he has no right thus to interfere."

Griffin v. Wilcox, 21 Ind. 370, 382.

And authorities are numerous to the effect that the President has no "War Power" to override the Constitution, or to do any acts in peaceful communities far from the actual strife of arms except by authority of laws duly enacted by Congress, acting within its constitutional power. If it should be found that the acts done were without any authority of law, under the Constitution, but depend solely upon a supposed "war power" to disregard the Constitution, at a time when the courts are open throughout every portion of the State of Pennsylvania, and every part of the United States, and when no hostile armed soldier is in or near our borders, then the language of the Supreme Court of Kentucky would be applicable, as follows:

"No citizen or soldier can shield himself

from responsibility for his wrongful act by pleading an unconstitutional order of the President of the United States, authorizing the act complained of."—**State of Indiana vs. Indianapolis Phone Co.** (not yet reported.)

Eufort v. Bevins, 64 Ky. (1 Bush) 460.

In Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, holding as unconstitutional the Child Labor Act of Congress the Court said:

"The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the Nation by the Federal Constitution."

"In interpreting the Constitution it must never be forgotten that the Nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National government are reserved. The powers of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of Congressional authority over interstate commerce, but would sanction an invasion by

the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

"This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

"The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

In the case of Commonwealth, Ex Rel. William I. Schaffer, Attorney General, vs. The Bell Telephone Company of Pennsylvania, before referred to, the Court in discussing the war power of the President said:—

"We have stated that the defendant company and the United States District Attorney also assert that the Postmaster Gen-

eral's power to change the rates which were theretofore adopted by the company and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States which makes the President thereof the Commander-in-Chief of the army and navy.

Under the provisions of the constitution there can be no question that the President of the United States is empowered as Commander-in-Chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of the war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as Commander-in-Chief of the army

and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the State authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but is acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interference with him as an official or with his official action and therefore would not be against the Federal government. Where the authority to do the act complained of is challenged the suit is not against the United States. Phila. Company vs. Stimson, 223 U. S. 605, 56 L. Ed. 570, United States vs. Lee, 106 U. S. 196, 27 L. Ed. 171. If he be acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

"But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This

proposition seems to be settled to the contrary in Mitchell vs. Harmony, 13 Howard, 115, 14 L. Ed. 75: Little vs. Barreme, 2 Cranch, 170, 2 L. Ed. 243. In the former case it was said, 'our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it clear that the law does not permit it.' If this be so as to the taking of property, it must be equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purpose having no apparent or direct relation to the prosecution of the war, it must be shown, we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges

and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the Congressional Resolution shows that in the opinion of Congress there existed no military necessity for changing the rates.

"It may be conceded that the courts have no power to review the President's official discretion in operating the Company for war purposes, but a different question is presented when it is claimed that in changing the rates and attempting to enforce the unapproved rates, he is acting beyond his powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes, he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if

he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or security and if he may not, as President, because of his office, be subjected to injunction or to the process of the Courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amenable to judicial process.

"We recognize the fact that there may be many cases involving the exercise of the President's war power where a Court of Equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national security or defense, and this is true, consequently, with respect to the rates chargeable for such use. They are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public."

The opinion of Judge Kunkel is so informing that we print it in its entirety at the end of this brief.

While it may be technically true that the war

has not ended because no formal treaty of peace has been signed, yet the war potentially has ceased and the emergency is over. Will this court halt a sovereign state in requiring obedience to its laws in a matter purely of local control, upon the vague assertion of a "war power" by a federal official with no allegation, much less proof, of an emergency calling for such an extraordinary and unheard of proceeding as this.

In its final analysis, what the Federal authorities in this proceeding call "war power," is really martial law, which has no place in our governmental existence save only when governmentally, we are "backs to the wall" and self preservation and necessity is the only code.

It is solemnly suggested to the court that America is not the place and that this instant hour is not the time, for the encouragement of novel experiment in forms of government; and that a heavy burden rests, and by right ought to rest, on any one who seeks to remove the ancient land mark which the fathers have set. The State of Pennsylvania bows to the reign of law, but now, as never before, the known certainty of the law is the bulwark, as well as the safety of all. The advocate of new methods, rather than he who plants himself on time honored principles, must establish his right. The thing which Congress authorized Postmaster General Burleson to take, any man with money enough could buy—that is, the control of the wire companies. The thing which he assumed is government itself, and he assumes it in the face of the

express reservation out of the grant of this very function of government.

BERNARD J. MYERS,

Deputy Attorney General.

WM. I. SCHAFFER,

Attorney General of the Commonwealth of Pennsylvania.

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNA.

Sitting in Equity.

Equity Docket No. 631.

Commonwealth Docket, 1919, No. 1.

COMMONWEALTH OF PENNSYLVANIA, EX. REL., WILLIAM I. SCHAFFER, ATTORNEY GENERAL, PLAINTIFF vs. THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, DEFENDANT.

KUNKEL, P. J., April 2, 1919:

The Attorney General has filed this bill in behalf of the Commonwealth and seeks thereby to restrain the defendant company from charging rates for the use of its lines within the State different from those approved by the Commonwealth's Public Service Commission. A preliminary injunction was granted and the case is now before us on a motion to continue the same. The defendant has filed its answer in which it denies that it has any control over its lines or is now operating them, except under the direction and orders of the Postmaster General who has taken possession of and is operating them, and that the changed rates and toll charges are being enforced by him. It disclaims any responsibility for the operation of its lines under the new and unapproved rates. The jurisdiction of the Court also is questioned in a plea filed by the United States Attorney.

The Postmaster General in taking and assuming the control of the defendant's lines and in operating its systems, acted under the proclamation of the President of the United States issued July 22, 1918, to the effect directing that the supervision, possession, control and operation of telephone systems shall be exercised by and through the Postmaster General, said "Postmaster General may enforce the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine through the owners, managers, Board of Directors, receivers, officers and employees of said telegraph and telephone sys-

the Postmaster General by an order known as No. 2495 issued December 12, 1918, directed that the rates for toll service over the defendant's telephone lines should be charged and computed according to a standard schedule set forth in the order, which rates were not approved by the Commonwealth's Public Service Commission as required by the Public Service Company Law (P. L. 1913, p. 1374) and were different from those approved and theretofore in force. The President's proclamation was issued pursuant to a joint resolution of Congress, approved July 16, 1918, which provides that: "The President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine, cable or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall not extend beyond the date of the proclamation by the President of the exchange of the ratification of the treaty of peace. Provision is also made in the resolution for the payment of compensation to the persons affected for the use and operation of the systems. The resolution further provides that nothing in this Act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transmission of Government communication or the

issue of stock or bonds by such system or systems." Thus it appears the President is authorized when he shall deem it necessary for the national security or defense, to take under his control and operate in such manner as may be deemed needful or desirable, for the duration of the war, the defendant's telephone system; and the duration of the war is practically defined to extend to the date when the President shall proclaim the exchange of the ratification of the treaty of peace. The time when he shall exercise his authority and the manner of its exercise is committed to his judgment and discretion. However, the period during which he may exercise his authority is limited and he may not in exercising it, impair or affect the lawful police regulations of the States.

The action of the President in taking possession, assuming control and supervision of the telegraph and telephone systems within the jurisdiction of the United States is stated to be not only under and by virtue of the power vested in him by the Federal resolution but by all other powers thereto him enabling. The Commonwealth contends that the powers thus conferred may not be exercised at the present time because the war during which they were to be exercisd is at an end; that the resolution did not contemplate a change of defendant's rates and tolls by the President when authority was granted him to operate its lines; that the resolution of Congress has been misconstrued, as it specifically provides against the impairment or change of existing laws of the States in relation to taxation or the lawful police regulation of the several states, and that the required ap-

proval of the defendant company's rates by the Public Service Commission is one of the Commonwealth's police regulations. The defendant takes issue on these propositions and insists that the President's power to do the act complained of arises not only out of the resolution of Congress referred to, but also inheres in his office as Commander-in-Chief of the army and navy, which no Act of Congress can constitutionally limit. It further objects to the proceeding as being one in effect against the United States which has not consented thereto. The controversy is therefore over the power of the President and Postmaster General to change the rates from those approved by the Public Service Commission of the Commonwealth and in force prior to and at the time the defendant company was taken into their control and operated by them; and also over the jurisdiction of the Courts to interfere with them in so doing.

As has been said, it is averred and not denied that the officers of the company are not operating it or attempting to enforce the new rates and tolls, but it is contended on the part of the Commonwealth, that although not acting of their own motion but merely as a means and instrumentality, they are acting at the behest of the Postmaster General representing the President, and are thus assisting and abetting him in enforcing the changed tolls and to that extent they should be enjoined.

We have stated that the defendant company and the United States District Attorney also assert that the Postmaster General's power to change the rates which were theretofore adopted by the com-

pany and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States which makes the President thereof the Commander-in-Chief of the army and navy.

Under the provisions of the constitution there can be no question that the President of the United States is empowered as Commander-in-Chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as Commander-in-Chief of the army and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under

his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the State authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but is acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interference with him as an official or with his official action and therefore would not be against the Federal Government. Where the authority to do the act complained of is challenged the suit is not against the United States. Phila. Company vs. Stimson, 223 U. S. 605, United States vs. Lee, 106 U. S. 196. If he be acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This proposition seems to be settled to the contrary in Mitchell vs. Harmony, 13 Howard 115; Little vs. Barreme 2 Cranch, 170. In the former case it was said "our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." If this be

so as to the taking of property, it must be equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purpose having no apparent or direct relation to the prosecution of the war, it must be shown we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the Congressional resolution shows that in the opinion of Congress there existed no military necessity for changing the rates.

It may be conceded that the courts have no power to review the President's official discretion in operating the company for war purposes, but a different question is presented when it is claimed that in changing the rates and attempting to enforce the unapproved rates, he is acting beyond his

powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or security and if he may not, as President, because of his office, be subjected to injunction or to the process of the courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amenable to judicial process.

We recognize the fact that there may be many cases involving the exercise of the President's war power where a Court of Equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national security or defense, and this is true, consequently, with respect to the rates chargeable for such use. They

are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public.

It may be suggested that it is the duty of the President while in control of the defendant's lines to so operate them as to result in the least loss to its business. This may be true, but would hardly justify the change of the rates chargeable to others for the use of the lines when, in the absence of any proof on the subject, the rates fixed by the Public Service Commission, whose duty it is to pass on the question, must be presumed to be fair, reasonable and adequate between the company and its patrons. If they were not, there is no doubt on applying to it the Commission would have afforded ample relief.

It is also asserted that the President of the United States and his Postmaster General were warranted in changing the rates approved by the State authorities by the Federal Resolution which authorized the taking over, possession, control and operation of the defendant company's system of lines. It is important, therefore ,to examine into the Federal resolution and to ascertain whether it will bear the construction which they have put upon it. The very resolution to which they appeal for justification of their act expressly provides that in acting under it, the State's police regulations shall not be impaired. Here is an express prohibition against interference with the rates of the defendant company; for it cannot be successfully disputed that the regulation of rates by State

law is a police regulation. The suggestion that the police regulations referred to in the proviso mean police regulations other than those relating to rates and tolls is not tenable. To so hold would be practically to nullify the proviso. We cannot understand a construction which would hold the reference to be to that which is remotely rather than to that which is closely allied to the subject of the legislation. What we have said with respect to the relation of the rates and tolls chargeable by the company to the use of the lines for war purposes and for the national security and defense, under the Presidential power is applicable also to the use of the lines under the Federal resolution, even if no effect be given to the proviso. It is quite clear that the resolution did not contemplate an interference with the rates and tolls in force at the time it was passed. If it had made no declaration on the subject we would not assume that it intended to authorize the operation of the lines for purposes other than war purposes, or contrary to the laws of the State. Here too then it is evident that the President and his Postmaster General are acting beyond any power conferred upon them by the Federal resolution. It is no answer then to say that they were engaged in an official act, representing the government of the United States when they changed the rates and tolls chargeable for the use of the lines within the State by others, and may not therefore be interfered with or obstructed without the Government's consent.

It appears therefore that the change of the rates chargeable to the public has no effective relation to the use of the defendant's system for war pur-

poses or the purposes for which it was authorized to be taken over by the Federal authorities, either under the power of the President, as Commander-in-Chief, or under the Federal resolution.

The conclusion follows that neither the President nor the Postmaster General was acting officially in changing the rates and tolls, but they acted beyond the scope of their powers. In such case they are open to interference and prevention so far as lies in the power of the State Courts, especially in the present case where their act amounts to a disregard of the Commonwealth's laws and is an attempt to do that which the defendant company itself could not lawfully do.

It will hardly be questioned that the Commonwealth of Pennsylvania has the power to enforce its own statutes, and to prevent their violation; or that this Court has local jurisdiction to entertain the present bill for the purpose of preventing the violation of the order of the Public Service Commission. This right seems to be clear, Sect. 34, Act of July 26, 1913, P. L. 1429, Com. vs. Order of Solon, 166 Pa. 38; and we think anyone who undertakes to disobey the order should show such a state of facts as plainly justifies his action.

For the considerations stated which we feel are developed only in part, we are induced to continue this injunction until final hearing, when the facts of the case may be fully shown and the questions which have been raised may be more thoroughly discussed and considered.

Accordingly the motion to continue is sustained.

I fully concur in the foregoing opinion and conclusion.

Sam'l J. M. McCarrell, J.

In The

Supreme Court of the United States

October Term, A. D. 1918.

No. 957.

Writ of Error to Supreme Court of South Dakota.

DAKOTA CENTRAL TELEPHONE COMPANY

vs.

STATE OF SOUTH DAKOTA, ex rel., BYRON S. PAYNE, as Attorney-General, et al.,

AND

No. 967.

Certiorari to Supreme Court of Massachusetts.

FREDERICK J. MACLEOD and EVERETT E. STONE, Constituting the Public Service Commission of Massachusetts,

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

BRIEF ON BEHALF OF THE STATE OF MARYLAND.

Statement.

The Chesapeake and Potomac Telephone Company of Baltimore City, which furnishes local service throughout the State of Maryland, published advertisements in the daily papers of the City of Baltimore on April 15, 1919, that it would put into effect a new rate schedule on May 1, 1919. The Public

Service Commission of Maryland had previously approved and adopted a rate schedule, fixing the maximum rates for the various classes of telephone service furnished by the Chesapeake and Potomac Telephone Company, and was conducting an investigation for the purpose of revising this schedule. The investigation had, however, been postponed by the Commission, on application of the Telephone Company, until the unsettled conditions due to the war became stabilized. This postponement was made by the order of the Commission passed during the war, on December 6, 1917.

On July 23, 1918, the President, acting under the authority of the joint resolution of Congress, approved July 16, 1918, took possession of all telegraph and telephone lines, including that of the Chesapeake and Potomac Telephone Company of Baltimore City, and placed them in charge of the Post Master General. The latter assumed the power to increase intra-state rates without submitting them to the various State commissions. The rates which the Chesapeake and Potomac Telephone Company of Baltimore City put into effect on May 1, 1919, were, in accordance with this assumption, not submitted to the Public Service Commission of Maryland.

Under the Maryland law (Act of Assembly of Maryland of 1916, Chap 560), the Department of Law of the State, headed by the Attorney-General, has charge and supervision of the legal business of the State, but the provisions of that Act do not apply to the Public Service Commission of Maryland, which is expressly excepted therefrom. The Governor, upon the recommendation of the Commission, appoints the general counsel to the Commission (Annotated Code of Maryland, Vol. 4, Art. 23, Sec. 414). The Public Service Commission requested an opinion from its general counsel as to its rights in the matter of the proposed increase in rates, and on April 22nd, 1919, Hon. William Cabell Bruce, the general counsel to the Commission, advised the Commission that it had no jurisdiction, and it, therefore, took no action.

The Protective Telephone Association of Baltimore, a large and active business men's association, which had been

instrumental in the investigation before the Public Service Commission for the purpose of having reduced the Baltimore City telephone rates, after obtaining leave, filed a brief in these cases. Briefs have also been filed by leave of the Court on behalf of thirty-eight utilities commissions of the several States, and separate briefs have been filed by three or four States through their Attorney-General, all of these briefs being in addition to the briefs of the parties to the two cases. The reason for the general interest shown by the filing of these briefs, is that the same situation exists in practically every State in the country and the decision of this Court in these two cases will settle the question without the necessity of separate cases being filed in each State.

In view of the foregoing, I feel that the citizens of the State of Maryland as a whole should be officially represented before this Court in this matter, which is of vital interest to them. The Public Service Commission is precluded, by the advice of its counsel, from taking any action, and the Protective Telephone Association of Baltimore is, as I have stated above, a city business men's association and does not officially represent the State at all. I, therefore, as Attorney-General, ask leave to file this brief on behalf of the State of Maryland.

POINTS.

The questions involved in these cases are:

I.

Does the Resolution of July 16, 1918, Authorize the President and His Agents to Establish Maximum Intra-State Telephone Rates Without Regard to State Laws Requiring the Same to be First Submitted to and Approved by the Several State Utilities Commissions?

II.

ARE THE SUITS IN EFFECT SUITS AGAINST THE UNITED STATES IN CASES WHERE THERE IS NO EXPRESS STATUTE PERMITTING SUCH SUITS TO BE MAINTAINED?

I have presented these questions in the order named, because it seems to me that the decision of the first question will carry with it the decision of the second.

I.

DOES THE RESOLUTION OF JULY 16, 1918, AUTHORIZE THE PRESIDENT AND HIS AGENTS TO ESTABLISH MAXIMUM INTRA-STATE TELEPHONE RATES WITHOUT REGARD TO STATE LAWS REQUIRING THE SAME TO BE FIRST SUBMITTED TO AND APPROVED BY THE SEVERAL STATE UTILITIES COMMISSIONS?

The Resolution of July 16, 1918, authorizes the President, during the continuance of the war, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telephone system, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war. There follows a proviso for compensation, and then this proviso:

> "Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

The argument centers around the meaning of the words, "the lawful police regulations of the several States".

The Government contends that this phrase means regulations intended to protect the health, morals and safety of the public, and does not mean regulations passed in pursuance of the police power in its larger sense.

It is submitted, however, that the decisions of this Court do not sustain this position. The term "police regulations" is synonomous with "regulations to enforce the police power."

Thus, in a very early case, this Court had before it an Act of the Legislature of Iowa requiring railroad rates to be fixed, published and posted. A railroad company was sued for violations of these provisions. One of the defenses was that the Iowa statute was in conflict with the commerce clause of the Constitution of the United States.

No attempt was made by the State to control the rates that might be charged. This Court decided that such act was not a regulation of commerce. It said:

> "It is a police regulation, and as such forms 'a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general Government, all of which can be most advantageously exercised by the States themselves.' Gibbons vs. Ogden, 9 Wheat 1."
>
> Chicago & Northwestern Rwy. Co. vs. Fuller, 17 Wall. 560.

Again, in the great Grain Warehouse case, this Court said, speaking of the police powers of the State:

> "In their exercise, it has been customary in England, from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for service rendered, accommodations furnished and articles sold."
>
> Munn vs. Ill., 94 U. S. 113.

In a railway case, involving the right of the Railroad Commission of Texas to put into effect rates to be charged by the Texas and Pacific Railway Company, the right was upheld, as it had previously been in other cases. In that opinion, the following words were used, which, it is submitted, are suggestive as to the meaning of the Resolution of July 16, 1918:

> "* * * We are of opinion that the Texas and Pacific Railway Company is, as to business not wholly within the State, subject to the control of the State in all matters of taxation, *rates* and *other* police regulations."
>
> Reagan vs. Mercantile Trust Co., 154 U. S. 413.

The term "police regulation" was discussed in connection with a drainage statute of the State of Illinois. It was contended, in that case, that the decisions as to the *police power* of the State in relation to *public health, public morals* and *public safety* were not applicable to cases where the police power was exercised for *the general well-being of the community, irrespective of any question of health, morals or safety.* This Court refused to adopt that view, and said:

> "We hold that the police power of a State embraces *regulations* designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."
>
> Chicago, Burlington & Quincy Rwy. Co. vs. Ill., 200 U. S. 561.

It is clear from these decisions and from many others referred to in them, that rates are fixed by police regulations made by the States in the exercise of their reserved police power. The term "police regulations" is a familiar one in this Court and has been applied many times to those regulations which fix rates. Congress must be presumed to have known the meaning of the term. So knowing, it specially excepted from the power of the President, when he should take over the telephone companies, "the lawful police regulations of the several States." *It must have meant, by such language, those police regulations under which maximum rates had been fixed in Massachusetts, in South Dakota, in Maryland and in the other States.*

It is not desired to discuss the question of the power of Congress to authorize the President to fix rates, because it is submitted that it did nothing of the kind. In the exercise of

the war power, Congress could perhaps have authorized the taking over of the telephone lines and permitted no messages to be sent over them, except those relating to the war. It did not attempt to authorize the exercise of any such power, but left the people of the country in full use of their ordinary telephone facilities, except where government communications might be affected. In other words, Congress intended that the President should take over and operate the telephone lines of the country for the purpose of securing at all times safe and adequate means of communication in the conduct of the war, and for the purpose of preventing adequate means of communication to such of our enemies as might be within our borders. If, in accomplishing these objects, the cost of operating the various telephone lines increased, that cost should be paid by the people as a whole and should not be laid upon the telephone subscriber, who, in his capacity as a subscriber, had nothing to do with the war. In other words, the intention of Congress, evidenced by the Resolution of July 16, 1918, was to leave the telephone subscriber in the various States, in so far as rates were concerned, subject to the regulations existing before the President took over the various lines.

II.

Are the Suits in Effect Suits Against the United States in Cases Where There is No Express Statute Permitting Such Suits to be Maintained?

This question is involved in the first question, and its decision, it is submitted, will follow the decision of that question. If Congress did not intend to give the President and his agents the authority to fix rates, and if the agent of the President, acting in excess of his authority, is fixing rates, then these cases are similar to the case involving Arlington, where it was held that the military authorities holding the former residence of General Lee, were exceeding their authority, and, therefore, the suit was not one against the United States.

U. S. vs. Lee, 106 U. S. 196.

These suits were not brought against the President, or against his agent, the Postmaster General, because by the Proclamation of the President of July 22, 1918, under which he took over the telephone lines, he directed that the owners, etc., of the various telephone systems should continue the operation thereof "in the usual and ordinary course of the business of such systems, in the names of their respective companies, associations, organizations, owners or managers, as the case may be." The suits, therefore, are suits to compel the Telephone Companies within the States of Massachusetts and South Dakota to observe the laws of those States, and to prevent them from going beyond the authority given them by the Resolution of Congress and by the Proclamation of the President issued in pursuance thereof. The Companies claim the right to disregard the State regulations. They claim this right under the Act of Congress. If they are exceeding their authority under that Act, then they are not acting as agents of the Government, and the suit is not one against the Government. Therefore, the decision of this question necessarily follows the decision of the question first discussed herein.

CONCLUSION.

It is, therefore, respectfully submitted that this Court in deciding these cases should establish as the proper construction of the Resolution of July 16, 1918, and the Proclamation of July 22, 1918, that the President, the Postmaster General and the several Telephone Companies have not the authority to increase intra-state rates without the submission of the proposed new rates to the various bodies required by the police regulations of the several States to approve the same.

Respectfully submitted,

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